No. 96-485

Supreme Court, U.S.
FILED
OCT 25 1996
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

LONG ISLAND JEWISH MEDICAL CENTER,

Petitioner,

—v.—

GLENISS S. SCHONHOLZ,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

ANTHONY M. RADICE
Counsel of Record
WILLIAM E. ZUCKERMAN
MORRISON & FOERSTER LLP
1290 Avenue of the Americas
New York, New York 10104-0185
(212) 468-8000

Counsel for Respondent

October 25, 1996

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 5

I. THE SECOND CIRCUIT PROPERLY APPLIED THIS COURT'S PRECEDENT IN DETERMINING THAT LIJ'S SEVERANCE PLAN WAS GOVERNED BY ERISA 6

II. THERE IS NO CIRCUIT SPLIT REGARDING THE AVAILABILITY OF PROMISSORY ESTOPPEL UNDER ERISA IN APPROPRIATE CIRCUMSTANCES 9

CONCLUSION 13

TABLE OF AUTHORITIES

Cases	PAGE
Alday v. Container Corp. of America, 906 F.2d 660 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991)	10
Armistead v. Vernitron Corp., 944 F.2d 1287 (6th Cir. 1991)	10
Belanger v. Wyman-Gordon Co., 71 F.3d 451 (1st Cir. 1995)	7 n.4
Black v. TIC Investment Corp., 900 F.2d 112 (7th Cir. 1990)	12
Bogue v. Ampex Corp., 976 F.2d 1319 (9th Cir. 1992), *cert. denied*, 507 U.S. 1031 (1993)	7
Curcio v. John Hancock Mutual Life Ins. Co., 33 F.3d 226 (3d Cir. 1994)	11
Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. 1223 (1995)	11 n.7, 12
Degan v. Ford Motor Co., 869 F.2d 889 (5th Cir. 1989)	11
Delaye v. Agripac, Inc., 39 F.3d 235 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 1402 (1995)	8 n.5
Devoll v. Burdick Painting, Inc., 35 F.3d 408 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 1381 (1995)	10, 11
Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1989)	10
Fontenot v. NL Industries, Inc., 953 F.2d 960 (5th Cir. 1992)	7 n.4, 8-9

PAGE

Fort Halifax Packing Co. v. Coyne, 482 U.S. 1 (1987) ..... *passim*

Greany v. Western Farm Bureau Life Ins. Co., 973 F.2d 812 (9th Cir. 1992) 11, 12

Grimo v. Blue Cross and Blue Shield of Vermont, 899 F. Supp. 196 (D. Vt. 1995) 9 n.6

Izzarelli v. Rexene Products Co., 24 F.3d 1506 (5th Cir. 1994) 11-12

James v. Fleet/Norstar Financial Group, Inc., 992 F.2d 463 (2d Cir. 1993) 7-8

Kane v. Aetna Life Ins., 893 F.2d 1283 (11th Cir.), *cert. denied*, 498 U.S. 890 (1990) 10, 12

Kulinski v. Medtronic Bio-Medicus, Inc., 21 F.3d 254 (8th Cir. 1994) 8

Law v. Ernst & Young, 956 F.2d 364 (1st Cir. 1992) ..10, 12

Lee v. Burkhart, 991 F.2d 1004 (2d Cir. 1993) 10

Madonia v. Blue Cross and Blue Shield of Virginia, 11 F. 3d 444 (4th Cir. 1993), *cert. denied*, 114 S. Ct. 1401 (1994) 9 n.6

Massachusetts v. Morash, 490 U.S. 107 (1989) 6 n.3

Miller v. Coastal Corp., 978 F.2d 622 (10th Cir. 1992), *cert. denied*, 507 U.S. 987 (1993) 10

Miller v. Taylor Insulation Co., 39 F.3d 755 (7th Cir. 1994) 10, 11

In re Momentum Mfg. Corp., 25 F.3d 1132 (2d Cir. 1994) 12

Nachwalter v. Christie, 805 F.2d 956 (11th Cir. 1986) 11

PAGE

National Companies Health Benefit Plan v. St. Joseph's Hosp. of Atlanta, 929 F.2d 1558 (11th Cir. 1991) 12

Pane v. RCA Corp., 667 F. Supp. 168 (D.N.J. 1987), *aff'd*, 868 F.2d 631 (3d Cir. 1989) 7 n.4

Slice v. Sons of Norway, 34 F.3d 630 (8th Cir. 1994).. 10, 11

In re Unisys Corp. Retiree Medical Benefit "ERISA" Litigation, 58 F.3d 896 (3d Cir. 1995) 10

Williams v. Wright, 927 F.2d 1540 (11th Cir. 1991) ... 9 n.6

Statutes and Regulations

29 U.S.C. § 1001 *et seq.* (ERISA) ..... *passim*

29 U.S.C. § 1102(a)(1) 11

29 U.S.C. § 1102(b)(3) 11

29 C.F.R. § 2510.3-3(b) 9 n.6

29 C.F.R. § 2510.3-3(c)(1) 9 n.6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-485

LONG ISLAND JEWISH MEDICAL CENTER,

Petitioner,

—v.—

GLENISS S. SCHONHOLZ,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

Respondent respectfully requests that this Court deny the petition for writ of certiorari submitted by petitioner Long Island Jewish Medical Center.

STATEMENT OF THE CASE

Except to highlight the few points below, respondent Gleniss Schonholz incorporates by reference the statement of facts in the Second Circuit's opinion (A-2-4):[1]

[1] Schonholz adopts the abbreviations used in petitioner's brief ("Petition") unless otherwise noted.

The terms of LIJ's May 3, 1991 severance pay program (the "Severance Plan" or the "Plan"), including the eligibility requirements and other criteria, are succinctly described in the opinion below:

> Payments under the Severance Plan were to be based upon both the length of time the employee held his position and his prospects for reemployment, but they would be made only if the employee displayed a reasonable and good faith effort to obtain a position commensurate with his former level of responsibility. In addition, the employee would not be eligible for payments under the Severance Plan if the termination was for either illegal conduct or substantially deficient performance. The Severance Plan provided that the terminated employee would continue to receive other benefits, and contained no provision for its termination or amendment.

A-2; *see* A-35-37. The Plan thus required LIJ to make a discretionary, case-by-case analysis of (1) the circumstances of each employee's termination, (2) whether the employee was making reasonable efforts to obtain new employment and (3) whether such new employment was commensurate with the position the employee had occupied at LIJ (defined in terms of "former organizational level and scope of responsibility"). *See* A-7-8; A-36.

The Plan was created and maintained without ERISA's reporting and disclosure formalities: no formal plan documents were filed with the Secretary of Labor and no summary plan descriptions were distributed to the covered employees. *See* A-10-11. Moreover, as the Second Circuit noted, the employees covered by the Severance Plan reasonably perceived that LIJ had made an ongoing commitment to provide employment benefits (A-7-8), particularly given that "LIJ neither created nor circulated any documents purporting to

amend [or] modify" the Plan before it was terminated in March 1993. A-2.

Schonholz was a long-time employee of LIJ and its Senior Vice President and Chief Operating Officer from 1987 until her termination on April 1, 1993. Schonholz's termination was not for cause, but rather was precipitated by continuing disagreements and friction with LIJ's new Chairman. A-3. In December 1992, LIJ's then-President, Dr. Robert Match, informed Schonholz that he was going to ask for her resignation, which he formalized in a letter to her, dated December 18, 1992. *Id.*; A-39. The letter stated that "the terms of your severance will be governed by the LIJ Medical Center personnel policies applicable to members of the President's Council, including the Severance Pay Program dated May 3, 1991." A-39; A-3. In light of this promise, Schonholz opted neither to contest her termination nor to seek to negotiate an individual severance package pursuant to LIJ's long-standing policy and practice. R. 1152; Petition at 4. Rather, in acceptance of the terms offered in Dr. Match's letter, Schonholz submitted her resignation in a letter dated December 22, 1992 (A-40), and agreed to LIJ's request that she remain at her position until April 1, 1993. A-39. Nine days before the effective date of Schonholz's termination, on March 23, 1993, LIJ's Board of Trustees resolved to revoke the Severance Plan and, accordingly, to deny Schonholz the severance benefits to which she was entitled under the terms of both the May 3, 1991 Plan and Dr. Match's December 18, 1992 letter requesting her resignation.

In addition to the facts highlighted above, Schonholz corrects the following factual inaccuracies in LIJ's brief:

First, LIJ states that its President merely "*purported* to establish" the Severance Plan for Schonholz and the seven other senior-level employees (Petition at 4) (emphasis added), suggesting that the Plan was unauthorized because it "was not submitted to LIJ's Board of Trustees for review, much less

approval." *Id.* at 3. In fact, Dr. Match, LIJ's President and Chief Executive Officer, indisputably had the authority to promulgate the Severance Plan, as expressly set forth in LIJ's corporate bylaws, which confer upon the CEO the responsibility of "developing and maintaining personnel policies and practices." R. 98.[2] The record is also clear that Dr. Match, himself a Board member, sought and obtained approval from then-Chairman of the Board William Mack before implementing the Plan. R. 452, 508, 633-34, 1458-62, 1464.

Second, LIJ incorrectly maintains that the decision below "dramatically alters" this Court's precedent by requiring that, whenever an employer makes a discretionary offer of severance benefits, "the employer must comply with *all* of ERISA's substantive and *procedural* requirements—regardless of whether any plan or administrative program is implicated." Petition at 11 (emphasis added). Both the district court and the Second Circuit held that ERISA protects an employee's interest in a welfare benefit plan *regardless* of whether the employer complies with all the procedural (*i.e.*, administrative and reporting) requirements of ERISA. A-18-19 n.1; *see* A-4-8. Indeed, in its brief to the Second Circuit, LIJ asserted (and Schonholz did not contest) that, pursuant to Department of Labor regulations, LIJ's Severance Plan was exempt from

---

[2] Elsewhere, LIJ admits as much by acknowledging that the "decision whether to grant a senior manager any benefits upon involuntary termination, and in what amount, rested, ultimately, with Dr. Match." Petition at 4. Indeed, Dr. Match routinely authorized and implemented employee benefit programs that were more extensive and expensive than the Severance Plan without Board approval or involvement. R. 390-98, 1343-44, 1351-52, 1358-64.

LIJ is also incorrect to label the Severance Plan a "golden parachute" (Petition at 3, 16), with the attendant inference that the Plan was excessively generous. The record reflects that the Severance Plan was a conservative, reasonable and customary severance policy that was, if anything, less generous than the policies which were prevalent in the health care industry, both when it was established and when Schonholz made her claim under the Plan. R. 191, 193, 450-51, 1294, 1297, 1320-22, 1458-59.

ERISA's reporting and disclosure provisions. *See* A-11. Although LIJ now misstates the holding below as mandating that all employee welfare benefit plans must comply with all of ERISA's procedural requirements, the Second Circuit expressly stated that this Court has "clarified that such adherence to formalities is not mandated by the statute." *Id.*

REASONS FOR DENYING THE WRIT

This Court should deny the writ sought by petitioner because there is no conflict between the decision of the court below and those of this Court regarding the standard for ERISA pre-emption, and there is no circuit split on the availability of promissory estoppel under ERISA. The Second Circuit's determination that LIJ's Severance Plan was covered by ERISA is completely consistent with this Court's holding in *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987). The few circuit courts that have declined to apply promissory estoppel as a basis for recovering ERISA plan benefits did so in cases in which the *facts* did not support an estoppel theory. Moreover, the case at hand affects the rights of just one participant in a benefit plan that has since been revoked; no other beneficiaries' rights are implicated. Accordingly, there is no reason for this Court to review the decision below.

I.

THE SECOND CIRCUIT PROPERLY APPLIED THIS COURT'S PRECEDENT IN DETERMINING THAT LIJ'S SEVERANCE PLAN WAS GOVERNED BY ERISA.

The Second Circuit correctly held that the Severance Plan—a typical offer of severance benefits—was an employee welfare benefit plan governed by ERISA, finding that the Plan "necessitated both managerial discretion and a separate analysis of each employee in light of certain criteria." A-7-8.[3] LIJ challenges that ruling by misconstruing this Court's decision in *Fort Halifax*, which held that a state statute requiring a one-time, lump-sum payment to employees who were laid off due to plant closings was not pre-empted by ERISA. The test that emerged from *Fort Halifax* for ERISA pre-emption was whether the provision of employee benefits required an "ongoing administrative program." 482 U.S. at 11-12. LIJ contends that the Second Circuit in this case has joined other courts in failing to adhere to the *Fort Halifax* test by looking to a plan's need for managerial discretion. As the Second Circuit and other courts have correctly recognized, however, "managerial discretion" is not a standard different from "ongoing administrative program"; evidence of the former is merely one way to demonstrate the latter.

The Second Circuit's opinion states that "it is plain that ERISA subject matter jurisdiction depends on the need for an administrative program," and reasons that a "variety of factors, including whether the employer's undertaking or obli-

---

[3] The Second Circuit's determination that this fairly common type of severance policy was an ERISA plan is entirely consistent with this Court's opinion in *Massachusetts v. Morash*, 490 U.S. 107 (1989), which observed that "plans to pay employees severance benefits, which are payable *only* upon termination of employment, are employee welfare benefit plans within the meaning of [ERISA]." *Id.* at 116 (emphasis in the original).

gation requires managerial discretion in its administration," aids in the "determination of which obligations are complex enough to require such a program." A-7 (citing *Bogue v. Ampex Corp.*, 976 F.2d 1319, 1323 (9th Cir. 1992), *cert. denied*, 507 U.S. 1031 (1993)). After discussing other factors courts have considered in making the determination,[4] the Second Circuit remarked, "We need not decide today which one or more of these factors will be determinative in every case because, in this case, we conclude that *all* of them favor Schonholz." A-7 (emphasis added).

In arriving at its conclusion that ERISA governs the Severance Plan, the Second Circuit expressly distinguished its decision in *James v. Fleet/Norstar Financial Group, Inc.*, 992 F.2d 463 (2d Cir. 1993), which involved an obligation similar to the one analyzed in *Fort Halifax*. In *James*, the court found that an employer's promise to provide its employees 60-days' additional pay in the event of a plant closing did not require an ongoing administrative program and thus was not

---

[4] In addition to *Bogue*, which assessed a plan's need for administration by whether it required "a case-by-case discretionary application of its terms," 976 F.2d at 1323, the court cited *Belanger v. Wyman-Gordon Co.*, 71 F.3d 451 (1st Cir. 1995), and *Fontenot v. NL Industries, Inc.*, 953 F.2d 960 (5th Cir. 1992). *See* A-7. In *Belanger*, the First Circuit looked to whether a "reasonable employee would perceive an ongoing commitment by the employer to provide employee benefits." 71 F.3d at 455. In *Fontenot*, the Fifth Circuit considered whether the employer was required to analyze the circumstances of each employee's termination separately in light of certain criteria. 953 F.2d at 963 (citing *Pane v. RCA Corp.*, 667 F. Supp. 168, 171 (D.N.J. 1987), *aff'd*, 868 F.2d 631 (3d Cir. 1989)).

Although LIJ argues that the district court in *Pane* and the Ninth Circuit in *Bogue* incorrectly applied *Fort Halifax* (Petition at 15), both courts expressly adhered to the ongoing administrative program standard and factually distinguished *Fort Halifax* in finding ERISA pre-empted the plans at issue. *Pane*, 667 F. Supp. at 170-71; *Bogue*, 976 F.2d at 1323. Indeed, LIJ seeks to create a circuit conflict merely by focusing on the *results* of the consistent *Fort Halifax* analyses conducted by the several circuits.

pre-empted by ERISA. A-6. By contrast, various managerial assessments and decisions inherent in the terms of the Severance Plan "required much more than the simple arithmetic calculations we held to be insufficient in *James*." A-7. "Unlike the employer's obligation in *Fort Halifax* and the promise in *James*, the Severance Plan was not limited either to a single payment or to a short span of time upon a plant or office closing. The Severance Plan's effective period was unlimited and would have reasonably been perceived by an employee as an ongoing commitment." A-8.[5]

LIJ cannot support its assertion that the Second Circuit's decision places it at odds with the Fifth and Eighth Circuits, which have "consistently adhered to the *Fort Halifax* analysis." Petition at 14 (citing *Kulinski v. Medtronic Bio-Medicus, Inc.*, 21 F.3d 254 (8th Cir. 1994), and *Fontenot v. NL Industries, Inc.*, 953 F.2d 960 (5th Cir. 1992)). In *Kulinski*, the Eighth Circuit determined a benefit plan did not require an administrative program by assessing whether it implicated the exercise of managerial discretion and finding that "there was nothing for the company to decide" and "no discretion for it to exercise." 21 F.3d at 258. In *Fontenot*—cited with approval by the Second Circuit (*see* A-7; note 4, *supra*)—the Fifth Cir-

---

[5] Thus, this case does not "place[ ] the Second Circuit in the intra-circuit conflict column," as LIJ asserts. Petition at 16. The Second Circuit factually distinguished the undertakings of the Severance Plan from the lesser obligation at issue in *James* in arriving at a different conclusion as to ERISA's applicability.

Moreover, although unsuccessful before the district court and the Second Circuit, LIJ continues to try to find significance in the fact that an administrative program was not yet in place when Schonholz made the first claim under the Severance Plan. *See* Petition at 5, 16. Plainly, *Fort Halifax* and its progeny look to the *need* for an administrative program, not to its implementation. *See Fort Halifax*, 482 U.S. at 11 ("[pre-emption] arises . . . with respect to benefits whose provision by nature requires an administrative program"); *see also, e.g., Delaye v. Agripac, Inc.*, 39 F.3d 235, 237 (9th Cir. 1994) (the test that has emerged from *Fort Halifax* is "does the benefit package implicate an ongoing administrative scheme?"), *cert. denied*, 115 S. Ct. 1402 (1995).

cuit looked to whether the circumstances of each employee's termination had to be analyzed in light of certain criteria in determining whether the plan at issue required an administrative scheme. 953 F.2d at 963.[6] These were two of the three factors the Second Circuit considered in finding that all of them supported the conclusion that the Severance Plan required an ongoing administrative program and thus was covered by ERISA. *See* A-7-8. The very cases on which LIJ relies thus demonstrate that there is no conflict among the circuits in interpreting the *Fort Halifax* standard for ERISA pre-emption.

II.

THERE IS NO CIRCUIT SPLIT REGARDING THE AVAILABILITY OF PROMISSORY ESTOPPEL UNDER ERISA IN APPROPRIATE CIRCUMSTANCES.

The Second Circuit's holding that Schonholz has a viable promissory estoppel claim is consistent with that circuit's precedent and does nothing to create or exacerbate a circuit split on this issue. As the Second Circuit had previously held, and reiterated in this case, "principles of estoppel can apply in ERISA cases under extraordinary circumstances." A-12

---

[6] LIJ cites no authority for its suggestion that the Fifth and Eighth Circuits have declined to apply ERISA to plans in part because they covered only "a handful of 'beneficiaries.' " Petition at 14. In fact, "it is well established that the requirement of a class of beneficiaries may be satisfied even when there is only one employee participating in the plan." *Grimo v. Blue Cross and Blue Shield of Vermont*, 899 F. Supp. 196, 202 n.6 (D. Vt. 1995) (citing *Madonia v. Blue Cross and Blue Shield of Virginia*, 11 F. 3d 444, 447-49 (4th Cir. 1993), *cert. denied*, 114 S. Ct. 1401 (1994); *Williams v. Wright*, 927 F.2d 1540, 1545 (11th Cir. 1991)). *See* 29 C.F.R. §§ 2510.3-3(b) & 2510.3-3(c)(1) (Department of Labor regulations providing that plan must involve at least one employee other than corporation's sole owner to satisfy ERISA "participant" requirement).

(citing *Lee v. Burkhart*, 991 F.2d 1004, 1009 (2d Cir. 1993)). Such circumstances can occur, as here, when an employer makes a written promise that is at the same level of formality as a plan creation document which lacks an amendment procedure, and an employee reasonably and detrimentally relies on that promise. *See* A-11, A-13-14. Estoppel claims under ERISA have been denied where the facts cannot support them; there is no circuit split on the availability of estoppel in appropriate circumstances.

This Court has sanctioned the development of federal common law to fill the interstitial gaps in ERISA's statutory scheme, *see, e.g., Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989), and, accordingly, the Second Circuit is among the many circuit courts to recognize estoppel claims under federal common law principles. *E.g., In re Unisys Corp. Retiree Medical Benefit "ERISA" Litigation*, 58 F.3d 896, 907-08 (3d Cir. 1995); *Miller v. Taylor Insulation Co.*, 39 F.3d 755 (7th Cir. 1994); *Devoll v. Burdick Painting, Inc.*, 35 F.3d 408 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 1381 (1995); *Slice v. Sons of Norway*, 34 F.3d 630, 634 (8th Cir. 1994); *Law v. Ernst & Young*, 956 F.2d 364, 367-68 (1st Cir. 1992); *Armistead v. Vernitron Corp.*, 944 F.2d 1287 (6th Cir. 1991); *Kane v. Aetna Life Ins.*, 893 F.2d 1283 (11th Cir.), *cert. denied*, 498 U.S. 890 (1990).

The cases LIJ cites for the proposition that some circuits do not allow promissory estoppel claims under ERISA simply do not involve facts in which estoppel would be appropriately applied. *See Miller v. Coastal Corp.*, 978 F.2d 622, 625 (10th Cir. 1992) (where ERISA plan at issue adhered to statutory formalities, the court declined to "enforce an informal written agreement under a theory of federal common law estoppel"), *cert. denied*, 507 U.S. 987 (1993); *Alday v. Container Corp. of America*, 906 F.2d 660, 666 (11th Cir. 1990) ("no federal common law right to promissory estoppel under ERISA in cases involving oral amendments to or modifications of employee plans") (citing *Nachwalter v. Christie*, 805

F.2d 956, 960 (11th Cir. 1986)), *cert. denied*, 498 U.S. 1026 (1991); *Degan v. Ford Motor Co.*, 869 F.2d 889, 895 (5th Cir. 1989) (promissory estoppel not cognizable to enforce "oral modifications to benefit plans"); *see also Devoll*, 35 F.3d at 412 (holding that, while ERISA pre-empts promissory estoppel under *state* common law, " 'federal equitable estoppel principles can, in certain circumstances, apply to some claims arising out of ERISA' ") (quoting *Greany v. Western Farm Bureau Life Ins. Co.*, 973 F.2d 812, 821 (9th Cir. 1992)).

LIJ thus cannot support its suggestion that circuits recognizing estoppel-based claims under ERISA have misused their authority to create federal common law by "revis[ing] the statute." Petition at 20. As shown above, courts have consistently denied estoppel claims based on oral promises or informal communications in cases where the plans are formal and properly maintained under ERISA procedures, because ERISA provides that "[e]very employee benefit plan shall be established and maintained pursuant to a written instrument," 29 U.S.C. § 1102(a)(1), which shall contain "a procedure for amending such plan, and for identifying the persons who have authority to amend the plan." *Id.* § 1102(b)(3).[7] Such claims are precluded by the terms and purpose of the statute. The Severance Plan, however, was created without ERISA's reporting and disclosure formalities and did not contain an amendment procedure. Several courts have recognized that employer communications may support an estoppel claim where they construe ambiguous plan language or are no less formal than other plan documents. *See, e.g., Taylor Insulation*, 39 F.3d at 759-60; *Slice*, 34 F.3d at 634; *Curcio v. John Hancock Mutual Life Ins. Co.*, 33 F.3d 226, 236-37 & n.17 (3d Cir. 1994); *Izzarelli v. Rexene Products Co.*, 24 F.3d 1506,

---

[7] Notwithstanding these statutory provisions, as noted in *Taylor Insulation*, "[t]here are no particular formalities that a welfare plan must comply with to be an ERISA plan. It need not even be in writing; . . . this is not a prerequisite to coverage." 39 F.3d at 760. *See Curtiss-Wright Corp. v. Schooenjongen*, 115 S. Ct. 1223, 1230-31 (1995); A-11.

1517-18 (5th Cir. 1994); *Greany*, 973 F.2d at 821-22; *Law*, 956 F.2d at 367-68; *National Companies Health Benefit Plan v. St. Joseph's Hosp. of Atlanta*, 929 F.2d 1558, 1571-74 (11th Cir. 1991); *Black v. TIC Investment Corp.*, 900 F.2d 112, 114-16 (7th Cir. 1990); *Kane*, 893 F.2d at 1285 & n.3; *see also, e.g., In re Momentum Mfg. Corp.*, 25 F.3d 1132, 1134, 1137 (2d Cir. 1994) (estoppel claim upheld where bankrupt company's "Disclosure Statement, together with other company communications," led employees to believe company's promise of severance, which it later sought to withdraw). This approach is consistent with this Court's recent pronouncement that ERISA "follows standard trust law principles in dictating only that whatever level of specificity [an employer] ultimately chooses, in an amendment procedure or elsewhere, it is bound to that level." *Curtiss-Wright Corp. v. Schoonejongen*, 115 S. Ct. 1223, 1231 (1995). Accordingly, the court below properly ruled that where an ERISA plan contains no amendment procedure, an employer's written communication to a plan participant that is at the same level of formality as other plan documents may support an estoppel claim.[8] The circuits are not split on this issue.

---

[8] The Second Circuit also held that the written communication promising Schonholz benefits under the Severance Plan supports her ERISA contract-based claim, an issue LIJ did not raise before this Court. Schonholz thus would have an alternate basis for recovery even if her estoppel claim were rejected.

CONCLUSION

The decision below does not conflict with any decision of this Court and does not present any genuine conflict among the circuits on any issue warranting this Court's review. Rather, the decision represents a proper resolution of the issues presented, consistent with the language and purpose of ERISA. For these reasons, the petition for writ of certiorari should be denied.

Dated: New York, New York
October 25, 1996

Respectfully submitted,

ANTHONY M. RADICE
Counsel of Record
WILLIAM E. ZUCKERMAN
MORRISON & FOERSTER LLP
1290 Avenue of the Americas
New York, New York 10104-0185
(212) 468-8000

Counsel for Respondent